

EASEMENT ENROLLMENT

PROVIDING CLEAR TITLE

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Easement Programs offered through the USDA-NRCS provide landowners a way to ensure the permanent protection of their property for specific uses. In most cases, this easement will be *in perpetuity* (forever). These uses include wetland habitat protection (Wetlands Reserve Program), floodplain protection (Floodplain Easement Program), grazing and pasture protection (Grasslands Reserve Program), and forest and timber stand protection (Healthy Forests Reserve Program).

While these programs offer many benefits to the landowner, participants should be aware of their responsibilities prior to conveying the easement to the United States of America. Among these responsibilities, the landowner must provide clear title to the land.

WHAT IS CLEAR TITLE

Land offered for enrollment in easement programs must not have encumbrances (title restrictions) that would impair the ability of the NRCS to acquire, manage, restore, and maintain the easement. There are many different types of title restrictions that could impact the eligibility of the land. It is the responsibility of the **landowner** to have these items addressed and corrected as required by NRCS and the closing company. NRCS may provide the landowner with a list of title exceptions, when known, that may impact the ability to enroll the land into an easement program. For difficult situations, landowners may seek outside counsel to assist in resolving title exceptions. NRCS will note the exceptions that must be removed and/or subordinated.

NRCS can not provide any legal advice or counsel in the process. It is the landowner's responsibility to provide sufficient documentation to remove any questionable title restrictions.

This document outlines a few of the more common encumbrances encountered, and very general approaches to resolving these issues. This document should not be construed as legal advice from NRCS, nor does it guarantee that the process listed will ensure title clearance and/or acceptance of a property into the easement program. Many factors are considered before land is enrolled into an easement program. Clear title is only one of these factors.

OWNERSHIP

The first and foremost step in ensuring smooth conservation easement conveyance is reviewing the property deed. The application for the conservation easement must be made in the exact name of the individual(s) or entity listed on the deed. All property owners must be in agreement and sign easement documents, conveying the property to the United States of America. Applicants should ensure all individuals listed on the deed and having ownership in a property are included on the application form and agreements. If a property is owned by a company, partnership, or corporation, the appropriate business name and Employee Identification Number (EIN) must be submitted as part of the application. Signatory authority for an entity must be provided at the time of enrollment.



Interested in learning more? Contact your local NRCS/SWCD field office. The local office staff will become part of your team to help complete each phase of this process. You are encouraged to contact them with questions, comments, and ideas.

<http://www.in.nrcs.usda.gov/>

MORTGAGES

Landowners should begin working with their lending institution right away to determine what steps are needed to address any mortgages on the offered land. Possible resolutions to the mortgage(s) on the property include 1) Paying off the mortgage prior to closing; 2) Having the mortgage paid off with the easement payment at closing; 3) A partial release of the mortgage by the lender-which releases that portion of a landowner's property that is going into an easement program; or 4) The lending institution signs a subordination agreement pertaining to the area under the mortgage. The subordination agreement essentially indicates the lending institution is aware of the easement being placed on the property, and accepts the terms and conditions of the easement. If this last option is chosen, a standard subordination agreement document will be provided by NRCS, through the landowner, for use by the subordinating entity.

Different mortgage companies have different requirements. These requirements may include a survey of the land separate from any NRCS will conduct on the easement area, appraisals, field reviews, etc. Satisfaction of any or all of these requirements will be at the landowner's expense. This is why it is critical to begin working with the lender early on in the process. An easement may not close or be compensated until it is known if the mortgage will be removed (paid) or subordinated.

LIENS

Besides mortgages, there are other liens that may be found on the title to a property and must be removed. These include material and mechanics liens, judgments, tax delinquency, foreclosure, etc. These issues must be resolved prior to NRCS proceeding with the closing process.

UTILITIES

Many properties have various utility easements and rights-of-way located in the offered easement area. These typically will show up on the title review as an *exception*. The utility company's easement supersedes any easement NRCS may place on the property. It is solely NRCS's discretion whether or not a utility and its associated easement are compatible with the purposes of the program, and therefore may be accepted into the easement. In some instances, management of the utility is not counter to the intent of the program (i.e., maintaining early successional habitat). In other instances, they may impede program restoration and management (i.e., cannot back water up into the utility easement to restore a wetland).

For those utilities not deemed acceptable for the program, there are several means to address the concern and have the exception removed from the title. These include:

- 1) Survey the utility out of the easement. This may cause the easement to be broken into unmanageable parcels, and NRCS may refuse to accept the property into the program. In some cases this may be the only viable option.
- 2) Have the utility company subordinate the easement.
- 3) Request the utility company abandon the easement. This is an especially good option on old, unused easements.
- 4) Have the utility company narrow a blanket easement (covering the entire property) to only include the area of the actual utility. This may reduce the utility easement to a size and location that can be considered acceptable to the program.
- 5) Move the utility. Some utility companies are willing to work with the landowners to find a more suitable, mutually beneficial location.

As with mortgages, landowners should begin working with the utility company as soon as possible. The utility company may have its own set of requirements and actions the landowner must take, including legal surveys, appraisals, descriptions, etc. Any expenses related to addressing title exceptions will be borne by the landowner. As with mortgages, the conservation easement may not close or be compensated until unacceptable utility easements are addressed.

DITCHES & COUNTY TILES/ DRAINAGE BOARD EASEMENTS

Some properties have legal surface and subsurface drains crossing through the easement. These frequently have a tax assessment associated with them. Similar to Utilities (see above), NRCS has sole discretion in determining whether or not the drainage easement is acceptable or not in the easement area. See above the potential options for addressing the drainage easements. Landowners should involve the county Drainage Board early in the process, to determine which options above are available and feasible. In some cases, it may be possible, with Drainage Board permission, to replace subsurface drains with solid tile. Work closely with your local NRCS staff to determine if this a feasible component of the restoration process.

MISCELLANEOUS

There are any number of other items that may show up on the title of a property that are unacceptable for conservation easement conveyance. NRCS has sole discretion in determining whether or not the title encumbrances are acceptable or not in the easement area. Landowners should be prepared to work with NRCS, various institutions, companies, or legal counsel to have these items cleared from the title.

MINERAL RIGHTS

Some properties have exceptions on the title granting mineral companies the right to drill or mine natural resources on the property. No surface disturbance may occur on the conservation easement, but horizontal/diagonal drilling from off of the easement may occur. The landowner should work with the mineral company as soon as possible to determine if the company is willing to rewrite its agreement to state only horizontal and/or diagonal, offsite mineral extraction activities will occur. As with mortgages, a subordination agreement can also be done concerning mineral rights. If this is an option, the landowner should request a standard subordination agreement form from NRCS.

Any pipelines found on the property will be subject to NRCS review for compatibility. In most cases, pipelines will be left out of the easement, but as with utilities, leaving the pipeline easement outside of the conservation easement may break the conservation easement into unmanageable parcels. See the section on Utilities for possible ways to address pipeline activities.

The guide *Mineral Interests on Your Land: a Guide for Landowners in Indiana and Illinois* (The Nature Conservancy and Indiana University Conservation Law Center 2012) provides valuable information on dealing with mineral rights issues and can be made available by your local NRCS office.

